IN THE

Supreme Court of the United States,

OCTOBER TERM, 1933

No. 873

GUY T. HELVERING, Commissioner of Internal Revenue,
Petitioner,

AGAINST

THE NEW YORK TRUST COMPANY, as Trustee under Trust Indenture, dated December 24, 1921, by and between Conrad Henry Matthiessen and said The New York Trust Company,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION.

We respectfully submit that the petition for certiorari filed by the Solicitor General should not be granted because, except for the instant proceeding, the question is academic, and because the decision of the Circuit Court is correct.

I.

Petitioner's application for certiorari involves the question whether the Supreme Court should review a dead issue solely to resolve a conflict between Circuits.

The capital gain provisions were first adopted with the Revenue Act of 1921, c. 136, 42 Stat. 232, 233. So far as material here, these provisions were continued in the same form in Section 208 of the Revenue Act of 1924, c. 234, 43 Stat. 262, 263. An express provision was adopted in the Revenue Act of 1926, c. 27, 44 Stat. 19, 20, obviating the question.* The 1926 Act was applicable to the year 1925 [Sec. 200(a)]. The quoted provision of the 1926 Act has been continued in the 1928 and 1932 Acts [Sec. 101(c) (8)]. Thus, the question involved could arise only with respect to income for the years 1921 to 1924.

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* "In determining the period for which the taxpayer has held property received on an exchange, there shall be included the period for which he held the property exchanged, if under the provisions of Section 204 the property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged. *In determining the period for which the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of Section 204 such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.* In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of subdivision (c) of Section 203 of this Act, or of the Revenue Act of 1924, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution." (Italics ours)

It will be noted that the Petitioner does not claim the case presents an important question of general or federal law which has not been but should be settled by this Court. Diligent search and inquiry indicate that this is the only pending case involving the issue, and we understand this to be so. If our understanding is incorrect, we would be glad to have the Solicitor General inform the Court as to the facts in that respect.

Under such circumstances, we submit there is no good reason for this Court to grant the petition. Far from having any general application, the effect of this Court's decision would be limited to the instant proceeding. Presumably, the principal justification for certiorari where there is a conflict between Circuits is to avoid a situation provocative of litigation. Where, as here, a dead issue is involved, we submit that the conflict loses its significance and the application should be disposed of as though no conflict existed.

II.

The decision below is correct. It carries out the purpose of the statute (*Burnet* v. *Harmel*, 287 U. S. 103, 106) and is consistent with the interpretation in *Taft* v. *Bowers*, 278 U. S. 470, 482, 483, of the donor's basis provision.*

The failure of Congress specifically to disapprove of the contrary interpretation of the Treasury Department (I. T. 1660, II-1 C. B. 36; I. T. 1889, III-1 C. B. 70), when

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* "In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift." Sec. 202 (a) (2) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 229.

adopting the succeeding Revenue Act (Act of 1924) is of little significance standing alone, and loses all point in the light of the Committee Reports recommending changes in the next succeeding Revenue Act (Act of 1926).* Such Reports plainly indicate that both as to exchanges (with respect to which the statute approved the Treasury's Regulations) and as to gifts the enlargement of the 1926 Act was intended to be interpretative.

We submit that the construction claimed by the Petitioner is, as expressed in the prevailing opinion below, dependent upon "a sterile literalism which loses sight

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* The House Ways & Means Committee and the Senate Finance Committee Reports (H. R. Report No. 1 and Senate Report No. 52, 69th Congress, First Session) both contain the following statement:

> "Section 208(a) (8). *The 12½ per cent capital gain and loss provisions apply only to the sale or exchange of capital assets which have been held by the taxpayer for two years.* Under the reorganization provisions many transactions are exempt from tax until the stockholder disposes of his stock received as a result of the reorganization. As a result of this fact *the question frequently arises* as to whether the period that the taxpayer held the stock which he exchanged for new stock should be added to the period for which he held his new stock, in order to determine whether or not he has held it for two years. The amendment proposed to this section *incorporates in the law the present regulation of the Treasury* and provides that these two periods shall be added for the purpose of determining the period during which the property sold was held for the purpose of determining both gain and loss under this section. *The same question arises in the case of property received by gift after December 31, 1920.* The amendment provides that the period in which the property was held by the donor shall be added to the period in which the property was held by the donee in determining whether or not the property so received falls within the capital gain or loss section." (Italics ours)

of the forest for the trees." In *Pinellas Ice Co.* v. *Commissioner,* 287 U. S. 462, 470, this Court evidenced its disapproval of such an approach.

Conclusion.

Under the circumstances, the conflict in decision of the Circuit Courts of Appeals affords no substantial reason for certiorari. The decision of the court below was correct. The petition should be denied.

If, however, the petition is granted, the cross-petition filed by Respondent likewise should be granted.

Respectfully submitted,

J. Du Pratt White,
Counsel for Respondent.

March 1934.

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